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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

vs.

THOMAS A. BROWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, BRIEF IN SUPPORT THEREOF, AND MOTION AS TO THE RECORD.

JOHN WATTAWA,
V. O. HILL,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

vs.

THOMAS A. BROWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable the Chief Justice and the Associate Justices:

Jesse S. Shima, petitioner, prays for the issuance of a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia, entered January 18, 1943, in this cause, its number 8301 (R. 35), modifying a judgment of the District Court of the United States for the District of Columbia. The opinion of the Court of Appeals appears in the record herein (R. 33, 34), and is reported at this time in 6 *Federal Rules Service* 53 e. 32, Case 1.

Questions Presented.

I.

Was it intended, by the provisions of Federal Rule of Civil Procedure 53 (e) (3), to repeal or invalidate the Acts of Congress which comprise Sections 102-106, Title 16, District of Columbia Code, 1940 (31 Stat. 1230, 1231)?

II.

If so intended, has this Court the Constitutional power to receive and exercise a delegation of authority to repeal at its discretion an Act of Congress?

III.

Were any substantive rights of the petitioner abridged or modified by the application of said Rule, in the place of the Acts of Congress which comprise said Sections of the District of Columbia Code?

Statutes and Federal Rule Involved.

(a.)

Section 102, Title 16, of said Code:

"In actions at common law grounded upon an account, or in which it may be necessary to examine and determine upon accounts between the parties, the court, in its discretion, at any stage of the cause, may order the accounts and dealings between the parties to be audited and stated by the auditor of the court or by a special auditor to be appointed by the court for the purpose; in which case, if a jury shall have been sworn, they shall be discharged. The course of proceedings before the auditor shall be the same as in cases in equity referred to him. When his audit is completed the auditor shall file his report and account in the clerk's

office and give notice thereof to the parties or their attorneys, and at the expiration of thirty days after said notice judgment may be entered, on motion of either party, in accordance with said report and account, unless exceptions are filed thereto for errors in law or fact therein. The party excepting thereto shall point out particularly the item or items in such report and account excepted to, and state the grounds of such exception, and annex to his exceptions a certificate of counsel that, in his opinion, the matters of law therein stated are well founded in law, and an affidavit of such party that the exceptions are not filed for delay, and that the allegations of fact in said exceptions are true to the best of his knowledge and belief, and a copy of said exceptions shall be served on the opposite party or his attorney. (Mar. 3, 1901, 31 Stat. 1230, ch. 854, Par. 254; June 30, 1902, 32 Stat. 528, ch. 1329.)"

Section 103, Title 16, of said Code:

"When such exceptions are filed, the court shall enter the cause on the trial calendar of the term in which they are filed in its proper place, and the issues made by said exceptions shall be tried and determined in the same manner as other issues of law or fact made by the pleadings in an action at common law, and any part of such report and account not so excepted to shall be adjudged to be conclusive between the parties on such trial. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 255.)"

Section 104, Title 16, of said Code:

"If, in the opinion of the court, such issues are so numerous as to create confusion the court may, in its discretion, direct evidence to be received and considered by the jury as to a part of said issues, and direct the jury to retire and conclude as to the same before hearing the evidence as to the other issues, and this to repeat as often as may be necessary, the final conclusion of the jury as to all the issues to be announced as

their verdict; or may submit the different issues to the same jury at different times for their separate verdicts thereon, or submit such issues to different juries; or may pursue such other course as the rules of the court may prescribe to facilitate the determination of such issues. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 256.)"

Section 105, Title 16, of said Code:

"If only general, immaterial, or frivolous exceptions are made or they are filed without the certificate of counsel and affidavit of exceptant, required as aforesaid, they may be overruled by the court or a justice at chambers, on notice and motion, and judgment entered as if no exceptions had been filed. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 257.)"

Section 106, Title 16, of said Code:

"Upon the conclusion of such trial or trials the court shall enter judgment upon the auditor's report as affirmed or corrected by the findings of the jury. (Mar. 3, 1901, 31 Stat. 1231, ch. 854, Par. 258.)"

(b)

Act of June 19, 1934, Ch. 651:

"Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil

action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session. (Act of June 19, 1934, c. 651, Secs. 1, 2 (48 Stat. 1064), U. S. C., Title 28, Secs. 723b, 723c.)

(c)

Federal Rule of Civil Procedure 53 (e) (3):

"In Jury Actions. In an action to be tried by a jury the master shall not be directed to report the evidence. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report."

Jurisdiction.

This Court has jurisdiction under Section 240(a) of the Judicial Code, as amended by the Acts of February 13, 1925, and of June 7, 1934, and by virtue of alleged violation of the United States Constitution.

Petitioner's timely petition for rehearing (R. 35) was denied by the Court of Appeals February 10, 1943 (R. 42).

Statement of the Case.

Respondent sued petitioner June 3, 1938, in said District Court for $4,216.00 with interest from 1930, for board, including room, claimed to have been furnished to petitioner and wife under an agreement by petitioner to pay "a fair and reasonable sum". Petitioner denied making the agreement; and the periods, if any, in which board was furnished under it, were in dispute. (Respondent's statement of ac-

count listed about ninety-seven items, including board for ninety months at $50.00 per month, and seven payments, all of which were contested (R. 33).

Respondent on October 18, 1938, demanded jury trial (R. 29).

The first trial took place October 25 to November 1, 1940, with resulting verdict by jury, and judgment, for respondent for $1,016.00 (R. 17, 18). On motion of respondent, which was opposed by petitioner, the Court set aside said said verdict and judgment; and upon written consent of the parties referred the cause to the Auditor of said District Court to state the accounts between the parties, pursuant to said District Code provisions (R. 18). Respondent's later motion for instructions to the Auditor under that reference was denied (R. 19), the cause going to the Auditor on all issues. He held eight hearings, about thirty witnesses in all appearing. Extensive briefs were filed, and oral arguments had, the expense under such reference approximating $1,000.00 (R. 24), including Auditor's costs of $785.00.

The Auditor filed his Report with the District Court March 30, 1942, giving notice of such filing to the parties as required under said District Code provisions. He found for respondent for either $1,224.99 or $2,575.82, according as the Court might decide a question of law, namely whether the Statute of Limitations barred part of the claim (R. 33).

The cause being shortly thereafter assigned for further jury trial, petitioner applied to stay such assignment until after the expiration of the thirty-day period allowed under said Code provisions for filing any exceptions to the Auditor's Report; but the District Court by Memorandum filed April 23, 1942, ruled that as said Code provisions are procedural, they were repealed by the Federal Rules, and that the thirty-day period for exceptions was no longer applicable, and that therefore petitioner's application failed (R. 30, 31).

Petitioner thereafter and within thirty days from the filing of the Auditor's Report, filed exceptions to said Report (R. 19), as permitted under said District Code provisions. Respondent filed no exceptions or objections at any time (R. 33).

When the cause came on again for trial, petitioner moved to withdraw his exceptions as permitted under *Gilbert* v. *Association*, 21 App. D. C. 344, and to have the Report confirmed without any further trial, as "there would then be no exceptions filed in the case to the Report under the Statute in effect in the District of Columbia governing such matters" (R. 20). The Court denied the motion, holding in effect that the rule governed; and the case was again tried to a jury on all issues (R. 25, 33), the Auditor's Report being placed in evidence as permitted under the Rule. Verdict was rendered for respondent for $2,750.00 "without interest" (R. 26, 27). The Court added interest from the time suit was filed (R. 28).

Petitioner urged on his appeal to the Court of Appeals (a) that the District Court erred in not granting his said motion to be allowed to withdraw his said exceptions, and to have said Report confirmed, and its findings adjudged as final, without further trial, as provided under said Code provisions, and that therefore the verdict thereafter rendered was invalid, and that the cause should be remanded with instructions to vacate judgment entered upon that verdict, and to grant said motion; (b) that independently of said contention the District Court erred in adding interest.

The Court of Appeals modified the judgment by striking interest, but declined to sustain petitioner's contention (a) above, observing therein in part as follows (R. 34):

> "As the question is procedural, the Rule (Federal Rule 53 (e) (3)) invalidates the contrary provisions

of the (District of Columbia) Code.[4] The result seems unfortunate. Since it is desirable that parties and courts be spared the burden of re-trying issues, it seems desirable to require parties who wish issues re-tried to a jury to file, within a limited time, objections to a Master's findings on the same issues. But the District Court was bound by the Rule, and properly refused to 'confirm' the auditor's report."

February 1, 1943, petitioner filed Petition for Rehearing (R. 35-41), which was denied February 10, 1943 (R. 42).

Reasons Relied Upon for Allowance of the Writ.

In holding that the question is only procedural, and that therefore Federal Rule 53 (e) (3) invalidates the contrary provisions of the District of Columbia Code, which are Acts of Congress, the Court of Appeals has decided questions of general importance, relating to the application of the Constitution and to the construction of statutes of the United States, which have not been, but should be, settled by this Court. It also appears that the Court of Appeals has not given proper effect to this Court's decision in *Sibbach* v. *Wilson and Co., Inc.*, supra.

(a.)

The issue of the legality of the purported repeal, by said Rules, of Acts of Congress, whether the incidental question be procedural or not, is of general importance. It is of particular interest to the Bench and Bar, and to Congress. *Congressional Record,* 75th Congress, Third Session, Vol. 83, No. 117, Wednesday, June 8, 1938, pages 11159 to 11169. The Chairman of the Senate Judiciary Subcommittee on that date observed on the Floor of the Senate in part as follows, following presentation of a resolution for post-

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[4] "[4] *Sibbach* v. *Wilson and Co., Inc.*, 312 U. S. 1" (Parenthetical matter supplied).

ponement of the effective date of said Rules of Civil Procedure (page 11163):

> "This is more than 'repeal by implication'. It is something unheard of in the history of legislative bodies. It would be sanctioning by silence repeals by others not having legislative powers, and outside of legislative halls, without Congress even knowing or being informed of the laws which are thus erased from the statute books by implication. It would be abandonment of the function of Congress to legislate; for it is as much the duty of Congress, and of Congress alone, to change the laws and to repeal the laws as it is to enact the laws. The duty of Congress to decide for itself whether laws should be repealed is so clearly a part of the warp and woof of our Constitution that it is idle to say that the performance of this duty may be excused because of the eminence of the gentlemen who have formulated the implied repeals and the long study which they have given to the subject."

(b.)

There is involved here, not only the question of the power of Congress to delegate authority to repeal an Act of Congress, but also the Constitutional power of this Constitutional Court to receive such delegation, or to exercise any delegation of legislative power, the repeal of an Act of Congress being as much an act of legislation as the enactment of an Act of Congress.

(c.)

Sibbach v. *Wilson*, supra, a 5-to-4 decision, does not answer the above fundamental question, as it involved, not a Federal statute, nor a conflicting Act of Congress, as in the cause at bar, but merely the common law of Illinois and of Indiana. Accordingly this case is not ruled by *Sibbach* v. *Wilson*.

Moreover, under *Sibbach* v. *Wilson* it appears that there was not intended the complete and unconditional repeal of the Conformity Act by the Rules, as the decision of the Court of Appeals implies or assumes, but rather a *pro tanto* repeal, that is, repeal only "so far as such rules are within the authority conferred" (Headnote, *Sibbach* v. *Wilson*).

(d.)

In *Fennell* v. *Bache,* 74 App. D. C. 247, 123 F. (2d) 905 (certiorari denied, 62 S. Ct. 359, 86 L. ed. 257), the Court of Appeals, through Mr. Justice Rutledge, said in part at page 906:

> "The trial court's order necessarily determined that the common law procedure (in the District of Columbia) was not changed by the Federal Rules. We have to determine whether this decision was right." (Parenthetical matter supplied.)

In holding that such decision was right, the Court of Appeals commented upon the hardships accruing to a plaintiff under its said ruling, but stated (page 908) that "we think it more appropriate for such sweeping change as would be required by a holding in accordance with the plaintiff's view, to be made by the Congress rather than by ourselves." If common law procedure in the District of Columbia has not been changed by the Federal Rules, then surely the procedure therein, as established by express Acts of Congress, has not been so changed.

Petitioner relied before the Court of Appeals upon *Fennell* v. *Bache,* supra, and cited the same, but that Court makes no mention of said decision in its opinion herein (R. 33, 34), and does not specifically reverse the same. It would appear, therefore, that two conflicting, but binding, decisions now exist as to the applicability of the Feleral

Rules to procedure in the District of Columbia, a situation requiring rectification by this Court.

(e.)

Said Act of Congress of June 19, 1934, provides that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

Accordingly, if it shall be the decision of this Court that it has the constitutional power to receive a delegation of authority to repeal an Act of Congress, and that by said Rule it intended to repeal or invalidate said Code provisions, then it becomes necessary to determine whether said Code provisions, and like provisions in other jurisdictions, provide or provided substantive rights to a litigant within the purview of said Act of June 19, 1934, which rights may not, under that Act, be abridged or modified by the Federal Rules. The efficient administration of Justice under such Rules requires, it is submitted, the establishment by this Court of more clearly defined standards for determining and distinguishing the substantive rights which stand protected under that Act.

The District Code provisions in question have been in effect in the District of Columbia for many years. They have served a most useful purpose in simplifying issues, and in minimizing the length and expense of litigation, thereby promoting the ends of justice, a fact recognized by the Court of Appeals itself which, in holding that they were invalidated by the Rule, nevertheless observed (R. 34):

> "The result seems unfortunate. Since it is desirable that parties and courts be spared the burden of retrying issues, it seems desirable to require parties who wish issues re-tried to a jury to file, within a limited time, objections to a master's findings on the same issues."

The Court of Appeals seems to indicate by the above comment that although it deems the rights herein involved to be only procedural, they are nevertheless exceedingly substantial. And, in the case at bar, the result renders nugatory the wise admonition contained in Federal Rule 1 that said Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."

Conclusion.

Wherefore, it is respectfully submitted that this petition for allowance of a writ of certiorari should be granted.

JOHN WATTAWA,
VIVIAN O. HILL,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

v.

THOMAS A. BROWN.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The opinion of the Court of Appeals appears in the record at page 33, and is reported 6 *Federal Rules Service*, 53 e. 32, Case 1.

The questions presented, the Statutes and Federal Rule involved, Statements of Jurisdiction and of the Case, and Reasons Relied Upon, appear in the foregoing Petition, and in the interest of brevity are not repeated here.

Specification of Error.

It was error for the Court of Appeals to hold (a) that Federal Rule 53 (e) (3) invalidates said District of Columbia Code provisions, and (b) that the question is procedural.

ARGUMENT.

I.

The Acts of Congress, comprising Sections 102-106, Title 16, District of Columbia Code, 1940, whether they grant substantive rights or are merely procedural, are not repealed or invalidated by the provisions of Federal Rule of Civil Procedure 53 (e) (3).

This Court held in *Sibbach* v. *Wilson and Co., Inc.*, 312 U. S. 1, 9, 10, that:

> "Congress has undoubted power to regulate the practice and procedure of Federal Courts, and may exercise that power by delegating to this or other Federal Courts authority to make rules *not inconsistent with the Statutes or Constitution of the United States.*" (Italicizing supplied.)

(a.)

The Court of Appeals held herein that the Code provisions are contrary to the Rule, which means that the Rule is inconsistent with the Code provisions.

Under Federal Rule of Civil Procedure 81 (e), it is provided that "when the term 'statute of the United States' is used, it includes, so far as concerns proceedings in the District Court of the United States for the District of Columbia, any Act of Congress locally applicable and in force in the District of Columbia."

When legislating for the District of Columbia under the eighth Section to the first Article of the Constitution, Congress is still the legislature of the Union, and its Acts are the laws of the United States. *Mattingly* v. *District of Columbia,* 97 U. S. 687, 690; *Cohens* v. *State of Virginia,* 19 U. S. 264, 6 Wheat. 264, 5 L. ed. 257; *Neild* v. *District of Columbia,* 71 App. D. C. 306, 110 F. 2d 246.

Accordingly, said District Code provisions are statutes of the United States; and as under the decision of the Appellate Court, they are contrary to the Rule, and are therefore inconsistent with the latter, the authority to make the Rule was not, and could not be, delegated by Congress, under *Sibbach* v. *Wilson,* supra.

(b.)

Article 1, Section 1, of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States."

The District of Columbia is a permanent part of the United States—the very heart of the Union over which Congress has permanent and exclusive power of legislation. *O'Donoghue* v. *United States,* 289 U. S. 516, 518. Congress has plenary and exclusive power to legislate for the District of Columbia. *Sims* v. *Rives,* 84 F. 2d 871, 66 App. D. C. 24, certiorari denied, 56 S. Ct. 950, 298 U. S. 682, 80 L. ed. 1402.

Therefore, it appears that Rule 53 (e) (3) falls within the further proscription announced in *Sibbach* v. *Wilson,* in that its effect, as declared by the Court of Appeals of invalidating a contrary Code provision, is inconsistent with the Constitution, under which Congress has plenary and *exclusive* authority as a national legislature to legislate for the District of Columbia.

(c.)

This Court cannot exercise authority to repeal an Act of Congress; and neither Congress nor the Executive can commit legislative or executive functions to this Court, or require their performance by it. If this Court can repeal these, or other, Acts of Congress, the question will arise as to where the exercise of such power might ulti-

mately lead. Also, only this Court can pass finally on the juridical issue of its right to receive and exercise delegated power to repeal Acts of Congress. If this Court through Rules could repeal Acts of Congress, the result might ensue of virtual nullification in such instances of the right of appeal to this Court upon the above juridical issue thereby arising, because the assumption would necessarily lie that this Court, by its prior issuance of such Rules, had already determined that it possessed the requisite power.

> "This Court * * * has no legislative powers. It cannot amend or modify any legislative Acts." *License Tax Cases,* 5 Wall. 462, 469.
>
> "It is therefore apparent that from its earliest history this Court has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Muskrat et al.* v. *United States,* 219 U. S. 346, 356.

(d.)

Article 1, Section 7, Clause 2 of the Constitution, provides that every Bill which has passed the House and Senate shall be presented, before it becomes a law, to the President who shall sign it if he approves; that if he does not approve he shall return it with his objections; that in such latter event, it may become a law only by passage by two-thirds of both House and Senate.

As the President has such Constitutional right to participate in the enactment of Acts of Congress, he has the corresponding right to participate directly in their appeal, of which right he stands divested by a holding that Acts of Congress are repealed or invalidated by Federal Rules of Civil Procedure. Any attempt by Congress to delegate its legislative power is also an attempt to delegate the above-indicated Constitutional power of the Executive.

(e.)

To have the force of legislation which it is now attempted to ascribe to them, the Federal Rules should have been clothed in the form of Acts of Congress, duly enacted as provided under the Constitution. Or, if Congress had in fact intended to establish the supremacy of the Federal Rules over existing and conflicting Acts of Congress, it would have specifically and promptly repealed the latter by direct and express legislation.

II.

The Acts of Congress, comprising said sections of the District of Columbia Code, provide substantive rights; and the application by the District Court of Rule 53 (e) (3), instead of said Acts of Congress, abridged and modified petitioner's substantive rights.

Said Act of Congress of June 19, 1934, provides that "said Rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant."

(a.)

When the first judgment for respondent was set aside upon his own motion, opposed by petitioner, and new trial granted, with consent reference then to the District Court's Auditor under said Code provisions, respondent's motion to instruct the Auditor as to the range of his Report being overruled, petitioner acquired the substantive right to have adjudged as final such findings effected under the reference as remained without exceptions thirty days after the filing of the Auditor's Report. By consenting to the reference, respondent waived the right of jury trial except upon issues raised by any exceptions; and when he filed

no exceptions, he fully waived the right of jury trial. At the immediate outset of the last trial, petitioner sought to withdraw his own exceptions (permissible under *Gilbert* v. *Association,* 21 App. D. C. 344), which would have left the Report entirely without exceptions after thirty days, and the cause devoid of any jury issue.

Otherwise stated, respondent waived his right to a jury trial, first, when he consented in writing to said reference, which by plain provision of law dispensed with jury trial and substituted trial to the Court, except in the instance of filing of exceptions to the Auditor's Report raising a jury issue. By his failure to file exceptions later, respondent again waived any right to jury trial, that is, he failed to take any action to bring the case within the only circumstance which would serve to nullify the effect of his former waiver of trial by jury. Hence, the trial could only have been to the Court, unless petitioner took steps to require trial by jury. But the latter expressly took steps to waive and avoid any such jury trial, by moving in open court to withdraw his exceptions and submit the case to the Court upon the conclusive findings of fact of the Auditor's Report. Therefore, the trial was to the Court, not to a jury, and Rule 53 (e) (3), which applies only to jury trials, was in effect inapplicable.

(b)

Over a period of years required for successive trials as here, witnesses become unavailable through moving elsewhere without known address. Those who remain in the jurisdiction tire of so many court appearances in the same case, and finally become unwilling, or even hostile, witnesses. During the course of all the hearings before the District Court's Auditor, the United States and Japan were at peace, but were at war at the time of the third and last trial, which was of great disadvantage to petitioner, a Japa-

nese national, brought into court as a defendant. For example, his key witness at prior trial, a U. S. Government employee, refused absolutely to testify for him at the last trial, and became very hostile, solely because of such state of war. Two of the panel of jurors at the last trial stated with emotion on the voir dire in the presence of the rest of the panel from which the jury was ultimately selected, that they would be unable to render a fair verdict herein because they could not forget Pearl Harbor.

Accordingly, denial of petitioner's motion to withdraw his exceptions, thereby leaving none at all, and to have the Code provisions thereafter applied, constituted abridgment or modification of petitioner's *substantive* rights, as the petitioner was then required to defend himself for a third time, at substantial additional expense, and at greater disadvantage, upon identical issues tried previously upon consent reference in a comprehensive trial before the District Court's Auditor, who had expressly remained uninstructed, the costs alone under such reference approximating $1,000.00.

(c)

Said Section 104, Title 16, District Code, provides that if the issues are so numerous as to create confusion, the Court may direct the jury to conclude as to a part of the issues before hearing evidence as to the other issues, this to repeat as often as may be necessary, their final conclusion as to all issues to be announced as their verdict, or may submit different issues to the same jury at different times for their separate verdicts; or may submit such issues to different juries; or may pursue such other course as the Court rules may prescribe to facilitate the determination of such issues.

Without any doubt, the issues in this cause are so numerous as to cause confusion, as appears from the pleadings

(R. 1-16), opinion of the Court of Appeals (R. 33, 34), and Statement of the Case, hereinabove.

Did petitioner request board for himself and wife, promising to pay a fair and reasonable sum? Or did respondent affirmatively seek their services in exchange for their board during such time as they should reside with him? If the former, then did petitioner make payments on account? Or were monies which passed to respondent from petitioner, loans or gifts? If the latter, what services, if any, did petitioner and his wife perform? Were they in full or partial compensation? Or were they wholly gratuitous? Did petitioner and wife receive board during the full eight years? Or during only part of that time? Is the Statute of Limitations a bar to recovery of any items? If so, as to which?

As the Court of Appeals found, respondent's statement listed some ninety-seven items, all of which are contested.

Due to the obvious complexity of the cause, and to the accounting aspects involved, the application of any Federal Rule which placed all issues, simultaneously, with the same jury for a single determination upon all issues, as occurred at the final trial, was not feasible (Federal Rule 86), and deprived petitioner of the further substantive right under said Acts of Congress, to seek to have each issue considered separately by the jury, their final conclusion as to all issues to be announced as their verdict, or to have the different issues considered by the jury at different times for separate verdicts thereon, or to have such issues submitted to different juries, or to have such other course pursued as the court rules may prescribe to facilitate the determination of such issues.

(d.)

Rights which superficially appear to be procedural, may be substantive, or may combine both characteristics. *Cities*

Service Oil Co. v. *Dunlop,* 308 U. S. 208, 60 S. Ct. 201, 84 L. ed. 196; *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64, 58 S. Ct. 817, 82 L. ed. 1188.

In his dissenting opinion in *Sibbach* v. *Wilson,* supra, Mr. Justice Frankfurter observed in part, at page 17, 312 U. S.:

> "It does not seem to me that the answer to our question is to be found by an analytic determination whether the power of examination here claimed is a matter of procedure or a matter of substance, *even assuming that the two are mutually exclusive categories with easily ascertainable contents*" (Italics supplied).

And again therein at page 18, he refers to "so-called procedural matters."

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 802

JESSE S. SHIMA,

Petitioner,

vs.

THOMAS A. BROWN.

MOTION AS TO RECORD.

To the Honorable the Chief Justices and Associate Justices:

Petitioner moves that his Petition for allowance of a writ of certiorari to the United States Court of Appeals for the District of Columbia, may be considered upon the Appendices to the Briefs of the parties filed in this cause in said Court of Appeals, and upon the proceedings and opinion in that Court, and for reasons therefor respectfully shows:

1. There was no challenge in the Court of Appeals as to any of the facts, and the only issues there were, and are here, of law.

2. The Appendices to said briefs carry all pertinent facts and prior proceedings (R. 1-31) and it appears clear that the Court of Appeals relied solely upon said Appendices as record there in this cause.

3. The Opinion of the Court of Appeals (R. 33, 34) sets forth pertinent facts and prior proceedings with completeness and accuracy.

4. February 20, 1943, petitioner filed Designation in the Court of Appeals (R. 42, 43), designating, for use as record in connection with this petition, said Appendices and the proceedings and opinion in that Court, serving copy of such Designation upon respondent (R. 43). The latter filed no Counter-Designation, nor did he object otherwise.

5. Despite oral and written requests by petitioner, and without advancing any reason therefor, and presumably with the purpose of desiring to discourage petitioner (brought into Court as a defendant) in his steps to obtain relief on certiorari, respondent now refuses to stipulate that this petition may be considered upon said Appendices and proceedings and opinion in the Court of Appeals.

6. Certified copy of said Appendices, and of said proceedings and opinion, has been lodged with the Clerk of this Court, along with ten plain copies of said Appendices and of said opinion.

7. No reference is made in said petition to any portion of the record not contained in said Appendices or in said proceedings and opinion.

8. The original record in the Court of Appeals has also been lodged with the Clerk of this Court.

9. If certiorari is granted, petitioner will promptly supply the requisite additional printed copies of said Appendices and of said proceedings and opinion; or, if so required, will promptly supply the requisite number of printed copies of further portions of the record in the Court of Appeals, or of the complete record there.

10. Please see *Fidelity Assurance Association* v. *Sims*, No. 319, this Court this Term, motion to consider petitioner for certiorari on Appendices, and petition for certiorari, granted.

Respectfully submitted,

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CLERK

Supreme Court of the United States

OCTOBER TERM 1942.

No. 802.

JESSE S. SHIMA, *Petitioner,*

vs.

THOMAS A. BROWN, *Respondent.*

RESPONDENT'S ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND ANSWER TO MOTION AS TO THE RECORD.

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OCTOBER TERM 1942.

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vs.

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RESPONDENT'S ANSWER TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND MOTION AS TO RECORD.

Answer to Motion as to Record.

Respondent objects to petitioner's motion (page 23 petition) that his petition be considered "upon the appendices to the briefs of the parties filed in this case in said Court of Appeals, and upon the proceedings and opinion in that Court", for the reason that the entire record before the lower Court was not printed in the appendices, but was before that Court for consideration. It would be unfair to the lower Court for respondent to consent to this action being considered here upon anything other than the entire record, which record was available to the lower Court and more than likely was considered by it in formulating its opinion. The entire record from the lower court although not printed is now on file in this Court.

Statement of Case.

If the Court deems it necessary on the points relied upon by petitioner to consider the facts of this case then the respondent relies upon the entire record from the United States Court of Appeals now on file in this Court.

Argument.

The petitioner on page 23 of his petition (Motion as to Record, par. 1) admits that the only questions presented for consideration before this Court are questions of law, although he spends many pages in his brief in argument of unnecessary facts, and also alleged facts that can nowhere be found in the record.

The petitioner propounds abstract questions to this Court for answer as though he had some right or authority so to do. (Petition page 2.)

The Act of June 19, 1934, Ch. 651 (Petition page 4) known as the enabling Act is very clear and concise and surely means what it says. It authorizes this Court to promulgate general rules for the district courts of the United States including the District of Columbia for the "forms of process, writs, pleadings, and motions, and the practice and procedure in civil action at law," and "thereafter all laws in conflict therewith shall be of no further force and effect." The rules as promulgated by this Court were forwarded to the Attorney General of the United States and by him sent to the Congress of the United States by letter of transmittal dated Jan. 3, 1938, and were approved by the Congress as was provided by their Act of June 19, 1934. (48 Stat. 1064) U. S. C. Title 28, see 723 b, 723 c (Petition pages 4, 5.)

Rule 53 of the Federal Rules of Civil Procedure sets out in detail the procedure to be followed in cases that may be referred to a master or auditor. Surely there can be no question but that this rule is in conflict with the procedure set out in sec. 102-106 District of Columbia Code of 1940 (31 Stat. 1230, 1231) (Petition pages 2, 3 4).

Sections 102-106 District of Columbia Code 1940 Have No Application to this Action.

Under no consideration could sec. 102 to 106 District of Columbia Code of 1940 apply to this case, as they apply only to mutual accounts between the parties, and the pleading and record herein disclose that no cross claim, countersuit or set off was filed, or claimed by the petitioner, and therefore the reference was necessarily made strictly in accordance with the Federal Rule of Civil Procedure No. 53.

> Eichberg vs. United States Shipping Board Emergency Fleet Corp., 51 App. D. C. 44, 273 Fed. 886.

If the wording of the Enabling Act means anything at all it surely repealed said code sections even if they applied to this action. If words are to have any meaning whatsoever there must be some limitation to their elasticity.

This Court in Sibbach vs. Wilson, 312 U. S. 1, seems to have settled the question as to the validity of the rules and their effect upon all federal statutes of procedure in conflict therewith.

There is no other question raised by the petition deemed worthy of comment.

Conclusion.

WHEREFORE the respondent prays that the petition for certiorari be denied and that respondent have his costs.

Respectfully submitted,

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